

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

JERRY GRADL MOTORS, INC.,  
LIFETIME MOTOR CARS, INC.,  
Individually and on Behalf of  
All Others Similarly  
Situating,

Plaintiffs,

v.

Docket Number:  
1-21-CV-00409-CCR

Buffalo, New York  
January 11, 2022

12:52 p.m.

ACV AUCTIONS, INC.,  
BRIAN M. MALCHAK,  
SUN CHEVROLET, INC.,  
WHOLESALE CARS ONLINE.COM,  
L.L.C.,  
JOHN NEIMAN,  
GEORGE CHAMOUN,  
DANIEL MAGNUSZEWSKI,  
TODD J. CAPUTO,

Defendants.

\* \* \* \* \*

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE CHRISTINA REISS  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography,  
transcript produced by computer.

1 (Proceedings commenced at 12:52 p.m.)

2

3 **THE CLERK:** The United States District Court for the  
4 Western District of New York is now in session.

5 This is the case of Jerry Gradl Motors, Inc. versus  
6 ACV Auctions, et al. 21-CV-409, before the Honorable Christina  
7 Reiss.

8 And if the attorneys could state their appearances for  
9 the record, please.

10 **MR. YANKELUNAS:** Good afternoon. Ed Yankelunas for  
11 the plaintiffs.

12 **MR. JURATA:** Good afternoon, Your Honor. Myriah  
13 Jaworski with Beckage on behalf of defendant ACV Auctions.

14 I also have my co-counsel, Mr. John Jurata with  
15 Orrick, on behalf of defendant ACV Auctions.

16 **MR. DEVENDORF:** Good afternoon, Your Honor. Jon  
17 Devendorf of Barclay Damon for defendant Malchak.

18 **MR. HOOVER:** Your Honor, Tim Hoover, Hoover & Durland,  
19 LLP for Sun Chevrolet, Inc., Wholesale Cars Online.Com and Todd  
20 Jacob Caputo, defendants.

21 Good afternoon, Judge.

22 **THE COURT:** Good afternoon to all of you. I'm going  
23 to ask that you announce yourself before you speak. We have a  
24 fair amount of people showing up on the squares and it's easier  
25 for the record and for the court reporter if it's transcribed

1 later.

2 My understanding, Ms. Duke, is that you don't use a  
3 court reporter. It gets transcribed from a tape thereafter?

4 **THE CLERK:** Yes.

5 **THE COURT:** Okay. So I have just two things to bring  
6 to your attention before we get started on the arguments.

7 And, obviously, the focus is whether this is a Federal  
8 Court case or those counts should be dismissed, and the Court  
9 should not exercise supplemental jurisdiction.

10 With regard to the anti-trust case claim, the U.S.  
11 Supreme Court in Leegin Creative Leather Products versus PSKS,  
12 551 U.S. 877 907, which is a 2007 case, held, and I quote, that  
13 vertical price restraints are to be judged by the rule of  
14 reason.

15 So I'm going to want to hear why this is a horizontal  
16 price restraint between competitors.

17 And if it is not a horizontal and it's a vertical,  
18 then you need a product market and you need a geographic market  
19 and neither is alleged in the complaint.

20 With regard to the RICO claim, in Riverwoods Chappaqua  
21 Corp versus Marine Midland Bank, 30 F.3d 339, it's a 1994 case  
22 for the Second Circuit, but it appears that all the circuits are  
23 in agreement, the Court held that corporations and its officers  
24 are not distinct from the corporation that allegedly  
25 participated in the RICO enterprise.

1           So you can't kind of conspire or engage in  
2 racketeering with yourself. And if the sole basis for your  
3 being in the RICO claim is because you are a corporate officer,  
4 I want to hear what a -- why that's sufficient.

5           In the case, to have a distinction between the  
6 corporation and the corporate officers to -- one of the things  
7 that the Second Circuit says: We have made clear that by virtue  
8 of the distinctness requirement, a corporate entity may not be  
9 both the RICO person and the RICO enterprise under Section 1962.

10           This does not foreclose the possibility of a corporate  
11 entity being held liable as a defendant under Section 1962,  
12 where it associates with others to form an enterprise that is  
13 sufficiently distinct from itself.

14           In this regard, we have noted that a Section 1962C  
15 claim may be sustained, where there is only a partial overlap  
16 between the RICO person and the RICO enterprise.

17           And the defendant may be a RICO person or one of a  
18 number of the members of the RICO enterprise, because a  
19 corporation can only function through its employees and agents.

20           Any act of the corporation can be viewed as an act of  
21 such an enterprise and the enterprise in -- in reality, no more  
22 than the defendant itself.

23           Thus, where employees of a corporation associate  
24 together to commit a pattern of product predicate acts in the  
25 course of their employment and on behalf of the corporation, the

1 employees in association with the corporation do not form an  
2 enterprise distinct from the corporation itself.

3 So those are kind of two fundamental questions I have,  
4 in addition to your ample briefing on this case, and I'm going  
5 to start with defendants as the moving party.

6 **MR. JURATA:** Thank you. Thank you, Your Honor.  
7 Again, this is Jay Jurata on behalf of ACV, also individual  
8 defendants Chamoun, Neiman and Magnuszewski.

9 And by agreement of the co-defendants today, Your  
10 Honor, I will be presenting the argument on behalf of all  
11 defendants.

12 Your Honor. The second amended complaint attempts to  
13 manufacturer a conspiracy that does not exist either factually  
14 or legally.

15 The alleged conspiracy is vertical in nature, as you  
16 referred to. Based on your question on Legan, it involves a  
17 single seller, a single buyer on top of an online platform;  
18 three distinct entities, all within a vertical relationship from  
19 each other.

20 The complaint does not allege facts sufficient to show  
21 an agreement, let alone one, involving all three of those  
22 entities.

23 And even if the complaint did cobble together an  
24 agreement, there is no allegations to demonstrate harm because  
25 the case is pled as a per se violation, which does not apply to

1 vertical restraints on trade, as held by the Supreme Court in  
2 Legan.

3 **THE COURT:** So let me give you --

4 **MR. JURATA:** Now, Your Honor.

5 **THE COURT:** Let me give you my try on the agreement.  
6 It is online platform. The biggest customer and an investor in  
7 it gets tipped off by the platform operator what the low bid is  
8 and is allowed to bid on its own vehicles and then not complete  
9 the sales.

10 And the reason why that works out for the online  
11 platform is it raises the price of cars, so people are paying  
12 more as in whatever fee the platform obtains and -- and they may  
13 have some other agreement as between the two of them as to why  
14 this is allowed.

15 And it's ultimately the consumer that pays more for a  
16 vehicle than it might otherwise pay.

17 So why -- at least at the pleading stage, isn't that  
18 sufficient for an agreement?

19 In an anti-trust, we actually look at criminal law for  
20 the conspiracy elements and it's an agreement between one or  
21 more persons or two or more persons -- excuse me -- to engage in  
22 illegal activity.

23 It's not a lot more complicated than that, so why is  
24 that not sufficient?

25 **MR. JURATA:** So, Your Honor, there is a couple reasons

1 why the factual -- why the complaint does not satisfy an  
2 agreement.

3 And I will first note that the factual scenario that  
4 you just gave in which the platform operator is tipping off  
5 users of the platform regarding something is not the factual  
6 allegations being made here in this case.

7 So maybe it would be helpful to start with what the  
8 core allegations are of the conspiracy, if I may, Your Honor.

9 So ACV operates an online platform, upon which used  
10 car dealers buy and sell cars via auction. That's contained in  
11 paragraphs 16 of the complaint.

12 Paragraph 17 of the complaint notes that for every  
13 auction, the seller designates a minimum for price that is not  
14 disclosed to potential buyers.

15 That paragraph also notes that if the auction results  
16 in a bid above that floor place, the car is automatically sold  
17 to the highest bidder.

18 Now, the other scenario, Your Honor, is the auction  
19 results in a situation where the highest bid is below the floor  
20 price.

21 The seller can either accept that bid, at which point  
22 there is a sale. The seller can decline that bid, at which  
23 point there is no sale.

24 And you see, you -- you can see examples of that in  
25 the exhibits that are attached to the complaint or the



1 counteroffer or the seller can make a counteroffer to the  
2 highest bidder, which may or may not be accepted.

3 And, again, you can see examples of that in Exhibit C  
4 to the pleading.

5 Now, with that factual framework --

6 **THE COURT:** Well, let me stop you, because that's part  
7 of the factual framework.

8 But in paragraph 25, upon information and belief by  
9 prior agreement with ACV and Sun Auto, the Sun Auto floor price  
10 of the vehicle being offered for sale by Sun Auto, using the  
11 ACV -- ACV online platform was disclosed to Malchak.

12 And with knowledge of that information, Malchak  
13 presented a phantom proxy bid at a price below the floor price,  
14 for the purpose of causing competing bids to increase it, shall  
15 it up, with no intention of purchasing the motor vehicle being  
16 offered for sale by Sun Auto.

17 **MR. JURATA:** Yes, Your Honor. I was just about to  
18 turn to that.

19 So there is a fundamental problem with that allegation  
20 and then I do want to address the factual scenario that you  
21 gave.

22 The fundamental problem with that allegation is that  
23 during in an anti-case -- in an anti-trust conspiracy, that  
24 there is an agreement that is a legal conclusion that is not a  
25 factual allegation.

1           The Supreme Court has said in the Twombly decision and  
2 multiple -- multiple cases in the Second Circuit have said that  
3 the word agreement is a legal conclusion and you actually have  
4 to look to see if there are facts that adequately allege that  
5 there is an agreement, as opposed to independent business  
6 conduct.

7           And we will talk about that and why the facts don't  
8 show that there is an agreement --

9           **THE COURT:** So let me stop you there. And the  
10 complaint goes on to say: Ordinarily, this would be something  
11 that ACV would not like at all.

12           Why are you doing this on our platform? And the  
13 allegation is ACV not only knew about it, but facilitated it.

14           And when somebody complained about it, who allegedly  
15 works for ACV, or some insider, they were told to stay out of  
16 it. This is not something that you should be pursuing.

17           So it's not that there is just a naked allegation that  
18 there was an agreement. The argument or the allegation is this  
19 would not make sense to ACV. They would be policing that  
20 platform and they are not policing that platform because it  
21 works for their advantage.

22           And as kind of an additional thing, in fact, somebody  
23 who was running ACV wanted a private app, so that they could  
24 kind of get into the action.

25           **MR. JURATA:** So, Your Honor, the basic core of the

1 agreement here or the alleged agreement here is contained in  
2 paragraph 29 of the second amended complaint.

3 And paragraph 29 makes clear that the floor price is  
4 supposedly exposed not through ACV, but through an alleged  
5 agreement between Sun Auto and Mr. Malchak.

6 That is based on some undisclosed prior relationship  
7 between individuals at Sun Auto and Mr. Malchak. There is no  
8 allegation in the second amended complaint that ACV is involved  
9 in any way of sharing the floor price with Mr. Malchak.

10 The only allegation --

11 **THE COURT:** Well, let me ask you about that, because  
12 that I see in paragraph 25. And I understand your argument is  
13 that's can conclusory, how else does the -- Mr. Malchak get the  
14 floor price?

15 So if it's not coming from ACV, he's getting it from  
16 Sun Auto?

17 **MR. JURATA:** So, Your Honor, the conclusory nature of  
18 this complaint makes us have to infer a little bit as to how  
19 Mr. Malchak is getting it.

20 But paragraph 29 makes clear that the -- the floor  
21 price is being -- if there is a floor price that is being  
22 shared, it is being shared by Sun Auto directly with  
23 Mr. Malchak.

24 There is nothing in paragraph 29 that ties ACV's  
25 involvement at all to the sharing of the floor price.

1           The allegation that ACV is somehow part of this  
2           conspiracy is based on claims, as you've already noted, Your  
3           Honor, that they were supposedly made aware of it and they did  
4           nothing.

5           They -- but there is no allegation in the complaint  
6           other than a conclusory reference to an agreement in paragraph  
7           24 and 25 that puts ACV in the mix as to how the floor price  
8           goes from Sun Auto to Mr. Malchak.

9           ACV's involvement is, based on the complaint, the fact  
10          that this happens on ACV's platform. There is nothing in any of  
11          the allegations regarding Mr. Neiman or Mr. Magnuszewski, which  
12          talks about bidding on cars that are sold by Sun Auto.

13          And the complaint is very clear that the alleged  
14          conspiracy involves only cars involving Sun Auto that  
15          Mr. Malchak bid on.

16          So everything about ACV, the allegation about an  
17          application, the allegation about -- about engaging in bidding,  
18          none of that in the complaint is tied to Sun Auto.

19          These are just generic allegations that don't go to  
20          the specific alleged conspiracy here, which is an agreement  
21          between ACV, Sun Auto and Mr. Malchak, which does not meet the  
22          pleading requirements set by the Supreme Court in the Twombly  
23          decision.

24          And there's a reason -- there is a reason for that,  
25          Your Honor, which is that companies engage very often in

1 independent business behavior.

2 And the Supreme Court has recognized that companies  
3 can engage in ways which may look like there is a price fixing  
4 agreement, when there is actually not.

5 And, instead, you just have parallel business behavior  
6 or even in some cases that the Supreme Court has said is  
7 completely legal, a company becomes aware of an arrangement and  
8 does independent business conduct that follows it.

9 But unless there is a requisite meeting of the minds  
10 or as the Supreme Court sets forth in the Montesanto decision,  
11 what is called a conscious commitment to a common scheme, there  
12 is no agreement.

13 That is why an agreement in anti-trust law is a legal  
14 conclusion, not a factual allegation.

15 And so, Your Honor, you noted --

16 **THE COURT:** But -- but at the pleading stage, the --  
17 there is also an abundance of case law that says in an  
18 anti-trust case, the hand -- the evidence is in the hands of the  
19 alleged co-conspirators.

20 And we don't need to have a document -- a written  
21 document that says, this is an agreement to conspire to increase  
22 the prices for Sun Auto cars.

23 It is definitely something that can be inferred. And  
24 one of the things the courts look at is how would this make  
25 sense.

1           So if something is happening on your platform that  
2 sticks out as a sore thumb -- and this is the allegation of the  
3 complaint; here's the number of transactions; here's the ones he  
4 bid on; here's the ones he actually bought, the Court isn't in  
5 the position to -- I mean, if it's implausible, that's one  
6 thing, but short of plausibility, accepting those facts are  
7 true, could you reasonably infer that this was by agreement  
8 between the party who has the authority to stop this and is not  
9 doing anything about it?

10           And then there is an allegation in the complaint that  
11 there was a complaint made about it to a person in authority and  
12 they said, don't touch it.

13           **MR. JURATA:** You know, I'm happy to address that --  
14 happy to address that question.

15           And the answer to that question is, again, in the  
16 Supreme Court's decision in the -- with the Twombly case -- and  
17 you are correct, Your Honor. There are multiple anti-trust  
18 cases that say evidence of a direct agreement is rare.

19           And the second amend complaint does not allege  
20 knowledge of a direct agreement. Instead, they are attempting  
21 to infer agreement.

22           Now, the Supreme Court said in Twombly that in order  
23 to infer an agreement, you look at something called plus  
24 factors.

25           And in the Second Circuit, there are three plus

1 factors which are of relevance. One, is a high level of inter  
2 firm communications; the second is parallel actions that are  
3 against the apparent independent economic interest of the actors  
4 and the third is a common motive to conspire.

5 And when you look at the allegations in the complaint,  
6 there is simply not allegations in support of certain plus  
7 factors.

8 There is nothing in the complaint that talks about any  
9 details of any meetings between Mr. Malchak and Sun Auto or  
10 Mr. Malchak and representatives of Sun Auto.

11 There is a -- just a -- there is just a very vague  
12 reference to a relationship. There is zero in the complaint.

13 Your Honor that talks about any inter firm  
14 communications between Mr. Malchak between Sun Auto and between  
15 ACV --

16 **THE COURT:** So --

17 **MR. JURATA:** -- in --

18 **THE COURT:** -- let me ask you about that, as that  
19 would not be a plus factor, because there is no requirement in  
20 the Second Circuit or elsewhere that there be inter firm  
21 communications and how would you have those prior to discovery.

22 **MR. JURATA:** So the -- in many anti-trust cases, they  
23 refer to actual meetings. Your Honor, the reason the Supreme  
24 Court made the bar so high in Twombly and anti-trust cases is  
25 because of the massive cost of discovery, the massive effect on

1 judicial resources in managing a case, and, again, the fact that  
2 you can have parallel conduct that is completely independent and  
3 not the result of an agreement.

4 **THE COURT:** So, but what's the parallel conduct?  
5 Because I don't see this as a parallel conduct case.

6 **MR. JURATA:** So the reason it's difficult to talk  
7 about it as a parallel conduct case is, Your Honor, again, this  
8 does not involve horizontal competitors. And your normal  
9 conspiracy would be horizontal competitors agreeing not to  
10 compete on price.

11 And when they talk about parallel conduct, it is when  
12 companies may be observing what their competitors are doing.  
13 Companies might be copying what their competitors are doing and  
14 as a result there is not price competition between them.

15 But see -- but because there is not an actual  
16 agreement not to compete on price, it is not deemed to be an  
17 illegal agreement under anti-trust law.

18 So when I'm referring to parallel behavior now, how  
19 does parallel behavior work in the vertical context?

20 It goes exactly to the question that you asked, Your  
21 Honor, why didn't ACV do something? That was your question to  
22 me.

23 **THE COURT:** Right.

24 **MR. JURATA:** And there are a variety of reasons as to  
25 why ACV may or may not have done something, just like even with



1 Mr. Malchak and Mr. Sun Auto and Sun Auto.

2 All the complaint alleges is that Mr. Malchak made a  
3 variety of bids below the floor price. All the complaint  
4 alleges is that Sun Auto received bids from Mr. Malchak below  
5 the floor price and did not exercise its legal option.

6 And I will stress their, Your Honor, option in order  
7 to accept -- in order to have a sale. So you look -- if you  
8 look at the actual facts in the complaint, all you get is that  
9 Mr. Malchak was only willing to pay up to a certain amount for  
10 906 transactions.

11 Sun Auto, for the vast majority of those did not  
12 accept that offer. On a couple transactions, Mr. Malchak's bid  
13 went above the floor price and there was an automatic sale or  
14 some of those, Sun Auto gave a counteroffer that Mr. Malchak  
15 accepted. And that for some reason, once ACV was told about  
16 this bidding activity, ACV didn't do anything.

17 And that is exactly the type of parallel business  
18 behavior that the Supreme Court has said does not infer an  
19 agreement.

20 You need something more. You need to look at inter  
21 firm communications. And in many anti-trust cases, there are  
22 references about people meeting at meetings, where they are  
23 conspiring.

24 In fact, that was one of the central allegations in  
25 the London Banking price fixing case that plaintiffs cite in

1 their option, that that case involved daily phone calls in which  
2 the alleged conspirators, they had daily phone calls at noon  
3 every day and that's where the alleged agreements were made, but  
4 the Supreme Court says that you are inferring -- you have to  
5 look to see.

6 And it's not saying that you have to have all of  
7 these -- these three things, but you're looking for those extra  
8 things that make it -- that would make you comfortable, Your  
9 Honor, in inferring an agreement.

10 So are there a level of high level communications  
11 between the parties? Are they acting against their economic  
12 self interest --

13 **THE COURT:** Now, let me stop at acting against their  
14 economic self interests.

15 So you are saying okay, this was brought to ACV's  
16 attention and ACV did nothing.

17 And in paragraphs 39 and 40, the plaintiffs go a bit  
18 further than that and they say a high level ACV executive was  
19 told about this and responded, leave that issue alone and drop  
20 it for your own good.

21 And then ACV's own employees were being damaged by  
22 this, because they lost the benefit of sales transactions if  
23 bids on those sales did not meet the improper show price.

24 And ACV vigorously discouraged any complaints by ACV  
25 employees about the ongoing shill bidding practices.

1           So I have a platform. I want people to trade on my  
2 platform. I think it's a great platform. The more volume, the  
3 better it is for me and for my employees.

4           I allegedly find out that somebody is shill bidding on  
5 it and they are not consummating those deals, so the sales are  
6 not going through.

7           And my employees say, hey, this is hurting us. We're  
8 not making money on this and I tell them none of your business.  
9 Drop it for your own good. I don't want to hear any complaints  
10 about that, so that that would be against economic interests,  
11 would it not?

12           **MR. JURATA:** Maybe -- Your Honor, maybe we would have  
13 to assess things that are not within the four corners of the  
14 complaint, such as how many transactions actually occur on the  
15 platform; what is the percentage of sales involving Mr. Malchak;  
16 on the overall platform, what would be the reaction on customer  
17 behavior if it became aware that ACV was -- to use your words,  
18 Your Honor, not policing its platform?

19           Those are all -- those are all things that that are  
20 out -- unfortunately, they are outside of the four corners of  
21 the complaint in order to answer.

22           **THE COURT:** Are we hearing in the complaint, though,  
23 that Sun Auto is the biggest customer and an investor in ACV? I  
24 thought I read that is.

25           **UNIDENTIFIED MALE SPEAKER:** Its in there, Judge.

1           **MR. JURATA:** So up -- Your Honor, there is an  
2       allegation that of the thousands of customers or the thousands  
3       of used car dealerships that use the ACV platform, that Sun Auto  
4       is the largest.

5           And, yes. I can represent that the complaint is  
6       accurate in stating that in stating that Mr. Caputo has a minor  
7       investment in the ACV -- in the ACV platform.

8           But, Your Honor, a common -- just a mere investment in  
9       a company does not make a motive to conspire.

10          In fact, in that regard, the allegations are very  
11       similar to the Allen versus Dairy Farmers case that you decided,  
12       in which the Dairy Farmers Association owned a 15 percent  
13       interest in defendant Hood.

14          In that case -- and when -- when you went through the  
15       various allegations and the various clutch factors in that  
16       decision, the 15 percent ownership was one of the things that  
17       you looked at before deciding that the defendant Hood -- that it  
18       wasn't alleged that defendant Hood was actually part of the  
19       conspiracy that you did find involving -- involving the other  
20       defendants in that case.

21          So, again, what the Supreme Court teaches in Twombly  
22       is you have to look at all of these -- all these factors  
23       together.

24          And, again, the mere knowledge -- the allegations that  
25       merely demonstrate that ACV had knowledge and may not have done

1 anything to address that, does not make them an active  
2 participant in the conspiracy.

3 In fact, Your Honor in the in re brand drug case, that  
4 cited -- that's cited in our brief from the Northern District of  
5 Illinois, in that situation, Your Honor, the defendant was aware  
6 of the price fixing conspiracy and did actions to benefit from  
7 it.

8 And what the Court said in that case was that -- that  
9 they could not be liable. Because, again, merely going along  
10 with something that they never came to a conscious commitment to  
11 a common scheme with the other defendants, does not  
12 automatically bring them into the conspiracy.

13 And the same scenario is here. ACV being informed,  
14 supposedly, of this at that point after the fact, and not doing  
15 anything, allegedly, to stop it, does not pool ACV into the  
16 actual conspiracy.

17 So it -- there the problems with the agreement is that  
18 when you look at the allegations in the complaint, there are no  
19 facts that are sufficient to infer an agreement between  
20 Mr. Caputo, Sun Auto and ACV.

21 And by the complaint's own language in paragraph 29,  
22 again, the passing of the floor price is not done through ACV.  
23 ACV is -- the only facts that tie ACV to this alleged conspiracy  
24 is the fact that it found out that -- it was informed about it  
25 at some point and didn't take any action.

1           And that is not enough to pull ACV into an alleged  
2           agreement between Sun Auto and Mr. Malchak, which is already  
3           deficient because that alleged agreement does not -- does not  
4           satisfy Twombly.

5           But the lack of an agreement, Your Honor, is only one  
6           reason why the anti-trust claim fails.

7           And the second reason why it fails is the point that  
8           you noted in the beginning of our -- of our argument today,  
9           which is that this is not a per se liability -- excuse me -- per  
10          se liability is inappropriate for the alleged vertical scheme  
11          here.

12          And, again, we're talking about participants at  
13          different levels of the platform. There is no allegation of any  
14          agreement between horizontal competitors.

15          And Leegin (phonetic) is directly on point that says:  
16          Vertical price restraints are evaluated by the rule of reason.

17          Except, Your Honor, the complaint never does the  
18          necessary pleading, which is necessary in order to determine  
19          whether or not there is an unreasonable restraint of trade.

20          Instead, they routinely refer to this as just a per  
21          se -- as just a per se conspiracy. There is no alleged product  
22          market.

23          I know in their opposition that they -- that they  
24          allege that one of the -- one of the paragraphs in the complaint  
25          demonstrates what the product market is, but, unfortunately,

1 that does not match with their class action allegations, which  
2 make it clear that the conspiracy is limited.

3 The alleged conspiracy is limited to only sales  
4 involving Sun Auto on the platform, but there -- there is no  
5 attempt to define a group of products to do exactly what you did  
6 in the dairy farmers case, Your Honor, and look at what is the  
7 interchangeability between the group of products; what are  
8 substitutes; what are not substitutes.

9 The -- there is -- there is none of that analysis.  
10 And the complaint is clear that ACV is only an online platform.  
11 The complaint does not say that ACV is the only online platform  
12 to wholesale cars.

13 The -- the complaint does not say that online  
14 platforms are the only way to wholesale used cars at auction.  
15 There is none of that analysis in the complaint.

16 And that's just the product market. The complaint is  
17 silent as to the geographic market.

18 So the only thing --

19 **THE COURT:** Well, it says -- it says something about a  
20 New York sub class, but if we are in the rule of reason, we do  
21 need a product market.

22 I could guesstimate what it would be and -- but we  
23 don't have anything that would help the Court define a  
24 geographic market.

25 **MR. JURATA:** That is -- that is correct, Your Honor.

1 And so for that -- for that reason, there is no way to conclude  
2 that there is an unreasonable restraint of trade, based on the  
3 pleadings.

4 These aren't new arguments the defendants are making.  
5 Defendants raised this exact points in the motions to dismiss  
6 the defendants filed in a response to the first amend complaint.

7 Plaintiffs were on notice as to defendants' arguments  
8 regarding the applicability of per se liability. They were on  
9 notice of defendants' arguments regarding the lack of agreement.  
10 They were on notices to the arguments on the lack of any -- on  
11 the lack of injury.

12 But when they when they submitted their second amended  
13 complaint, they chose not to address any of those arguments in  
14 serious detail and instead added a civil RICO claim.

15 So this is not the first time that the plaintiffs are  
16 aware that they were -- that it was necessary for them to allege  
17 both a product market and a geographic market, because this is  
18 not a case which is -- which warrants per se treatment.

19 Do you have any further questions on unreasonable  
20 restraint?

21 So, Your Honor, then I'll move to standing. And, you  
22 know, as you know -- as you know, Your Honor, in anti-trust  
23 cases in addition to having to allege the normal standing that  
24 you have for a Federal Court case, you have to also satisfy  
25 anti-trust standing, and how that is -- how there is a nexus



1 there between that and the alleged allegations. So what is the  
2 harm?

3 And there is -- there is only -- there is -- there, in  
4 the complaint itself, Your Honor, there is only a conclusory  
5 allegation of harm.

6 And it's the -- it's the -- it's the fact scenario  
7 that you gave earlier in my argument, Your Honor, where you  
8 were -- where you said that there could be a scenario in which  
9 the bidding causes other -- other -- other bidders to bid higher  
10 than they otherwise would and end up purchasing a vehicle at a  
11 higher price than they would.

12 And that may or may not be a viable theory, Your  
13 Honor. It's certainly not what is pled in the second amended  
14 complaint.

15 What's pled in the second amended complaint is other  
16 than -- other than the conclusory allegation that sellers --  
17 that the plaintiffs paid more than they otherwise would, all of  
18 the detail -- all of the detail facts in the second amended  
19 complaint are regarding the transactions that are attached in  
20 Exhibit A, B and C.

21 And, Your Honor, those are all transactions that do  
22 not -- that did not result in the plaintiff's purchasing a  
23 vehicle.

24 There is not any factual allegation in the complaint  
25 that plaintiffs purchased -- there are no details that

1 plaintiffs purchased vehicles from Sun Auto, let alone that they  
2 that -- they purchased vehicles from Sun Auto that Mr. Malchak  
3 bid on.

4 And the 906 transactions that are talked about so much  
5 in the opposition are scenarios that resulted in either a sale  
6 to Mr. Malchak or no sale whatsoever.

7 And, Your Honor, to the extent that the argument might  
8 be that maybe plaintiffs would have been the highest bidder below  
9 the floor price in those 906 transactions, were it not for  
10 Mr. Malchak -- and I think that's a very generous reading of the  
11 complaint, but if that would be the argument, they have no legal  
12 right to those vehicles because, again, the seller, as alleged  
13 in paragraph, I believe, 20, of the complaint -- the seller has  
14 the sole option as to whether or not to accept a bid that is  
15 below the floor price.

16 And so there is -- given that the 906 transactions  
17 involved either -- either transactions where Mr. Malchak  
18 purchased the vehicle or transactions in which there was no  
19 purchase whatsoever, there are -- there is no detailed fact or  
20 pleading going to the scenario that you raised, Your Honor,  
21 which is, well, maybe someone purchased a car at a price higher  
22 than they otherwise would have paid.

23 There is just -- there is just nothing to -- nothing  
24 to -- to get us there. We are -- we're --

25 **THE COURT:** Well, let's --

1           **MR. JURATA:** -- we're -- we're just --

2           **THE COURT:** -- let's look at paragraph 28.

3           In order to outbid the Malchak shill bids and purchase  
4           the vehicles being offered for sale by Sun Auto on the ACV  
5           online platform, bidders had to bid at prices higher than they  
6           would have otherwise bid and purchasers of the vehicles would  
7           have to pay a price higher than they would otherwise pay without  
8           the Malchak shill bids.

9           So the allegation is because Mr. Malchak knows what --  
10          what the -- what these -- what the floor bid is -- he's been  
11          tipped off as to the floor bid, he can alter the marketplace, so  
12          as not only to harm a competitor, plaintiffs, but also to drive  
13          up the cost of what other people are paying for his vehicles and  
14          that's the harm to competition.

15          Why is that not sufficient at the pleading stage?

16          **MR. JURATA:** Because, Your Honor, there is no actual  
17          evidence that suggests that people had to pay higher prices for  
18          cars than they otherwise would.

19          All of the evidence is in situations where Mr. Malchak  
20          supposedly gave false bids and no bidder valued the car.  
21          Because, again, let's -- let's understand what's going on here.

22          These are used car dealers. These are used car  
23          companies that understand what a car may or may not be worth and  
24          are going to decide what they are going to pay or not.

25          Just because an individual supposedly makes bids at

1 the price, does not mean that any of these are going to bid more  
2 than they are willing to pay.

3 You would have to show that ACV is the only way to  
4 purchase used cars at auction, for wholesalers, in order for  
5 that to be that kind of market power.

6 But it's a competitive --

7 **THE COURT:** So let me ask you about that. So let's  
8 say the geographic market is Buffalo or something like that and  
9 this is the biggest platform.

10 And they can allege that people tend to purchase a  
11 vehicle within a 60 mile proximity of where they live. And I  
12 agree, some of this is not in the complaint -- and that's part  
13 of the problem right now.

14 And the argument is that there is somebody on this  
15 platform who is not disclosed as the person bidding and they are  
16 putting in these shill bids that is driving up the price of  
17 vehicles and they have no intention to actually purchase them.

18 So when you are competing with this undisclosed  
19 bidder, who actually knows what the floor price is and you  
20 don't -- you are in an unfair competition, because they have  
21 inside information that is going to make sure they don't lose  
22 out on the sale and they don't actually even have to consummate  
23 it.

24 So on occasion, you will be the person duped into  
25 paying more than you need to, because you are bidding against

1 this proxy bidder. I think that's how it goes, according to the  
2 complaint.

3 **MR. JURATA:** So the problem with that scenario, Your  
4 Honor, is that there is no action under Federal anti-trust law  
5 for unfair competition.

6 The notion of unfair competition, it does not make a  
7 anti-trust violation. In order for there to be an anti-trust  
8 violation, there has to be a harm to competition.

9 And this is where -- and, of course, the complaint  
10 tries to side step that by saying it's a per se violation. At  
11 which point, you wouldn't have to actually show harm to  
12 competition.

13 But in the scenario where you do -- again, we have to  
14 go back to what the basic conspiracy is here. It's an online  
15 platform.

16 An online platform with many, many used car sellers  
17 and many, many used car buyers. The conspiracy here is between  
18 a single seller and a single buyer.

19 The conspiracy here does not allege -- does not extend  
20 to any of the other -- any of the other sales transactions that  
21 are happening on the platform.

22 Which means that if a customer believes that the bids  
23 on a certain vehicle are not worth the price of the car, they  
24 are going to do exactly what they did in the 906 transactions  
25 involving Mr. Malchak attached to the complaint, they are not

1 going to outbid, because they do not value the car.

2 So the actual evidence of transactions which are  
3 attached to the complaint actually demonstrate the opposite.  
4 It's not that people are paying higher for vehicles. It's that  
5 the vehicles are not being sold.

6 Why might that be? Well, if it's a competitive  
7 marketplace, because there are other buyers and sellers on the  
8 platform that are selling competitively priced vehicles,  
9 economics teaches us that people are not going to overpay for a  
10 car from Sun Auto, if they believe that there is a similar car  
11 at a better price from a auction that does not have shill  
12 bidding on it.

13 So unless the plaintiffs can demonstrate that every  
14 buyer -- I mean, every seller on the platform -- so of the  
15 thousands of companies that use this platform, the thousands of  
16 used car dealerships, they would have to show a horizontal  
17 conspiracy across all of them in order for there not to be  
18 competitively priced cars on the platform.

19 So, again, the plaintiffs submit Exhibits A, B and C  
20 as proof of their conspiracy. All Exhibits A, B and C show is  
21 that Mr. Malchak was willing to make a price of what he was  
22 willing to pay.

23 It was less than Sun Auto -- in most circumstances, it  
24 was less than what Sun Auto was willing to accept. And in some  
25 circumstances, the car was purchased because either Mr. Malchak

1 exceeded the floor price, at which point there was an automatic  
2 sale or Sun Auto decided to accept the counteroffer.

3           So -- so, again, Your Honor, while there is a  
4 generalized vague theory of harm that maybe people paid more,  
5 the actual factual -- the actual detailed factual allegations in  
6 the complaint show that there were no sales at all to -- to  
7 plaintiffs in this situation.

8           And so therefore, it -- therefore, there is no  
9 anti-trust -- there is no anti-trust standing.

10           So for each of those three scenarios, Your Honor, the  
11 lack of facts to allege the fact that the -- the lack of facts  
12 that are adequate to infer an agreement under the very high  
13 standard the Supreme Court set in Twombly; the fact that there  
14 has been no demonstration of any unreasonable restraint of  
15 trade, because this is pled as a per se conspiracy; and because  
16 of the fact that the plaintiffs have actually not been harmed by  
17 the alleged conspiracy that they are -- that the -- the alleged  
18 fact that they provided any detail for, each of those three  
19 independent reasons, the anti-trust claim just does -- you know,  
20 cannot -- cannot survive a motion to dismiss.

21           Unless -- unless, Your Honor has any questions about  
22 anti-trust, I'll move to civil RICO. Your Honor, thank you.

23           The civil RICO claim is an attempt to shoehorn the  
24 alleged conduct into a statute that it was designed to address  
25 ongoing criminal conducted criminal conduct, Your Honor.

1           And the allegation or the assertion that the facts  
2           alleged in the complaint refer to a -- a criminal racketeering  
3           enterprise, it just is not credible.

4           You know, the vast majority of created attempts to  
5           plead civil RICO claims are dismissed at the threshold. And I  
6           respectfully -- well, would submit that this is one of them.

7           Your Honor, RICO has long been recognized as the tool  
8           of the overzealous plaintiffs. Courts in the Second Circuit  
9           take very close looks at the allegations, given how -- given the  
10          fact that wire communications are so prevalent in business, that  
11          civil RICO claims require scrutiny up front.

12          And, you know, that's why courts flush out frivolous  
13          RICO claims at a early stages of litigation.

14          And as you noted, Your Honor, an entity can't engage  
15          in a RICO conspiracy with itself and that is -- that is one of  
16          the reasons why the RICO claim cannot survive -- cannot survive  
17          a Rule 12(b)(6) motion.

18          Again -- again, there has been a failure to allege a  
19          nexus between what otherwise is legitimate business activity and  
20          the alleged racketeering activity.

21          There is --

22               **THE COURT:**   Would you --

23               **MR. JURATA:**   -- failure to.

24               **THE COURT:**   -- would you agree with me that bid rig --  
25          bid rigging could be the subject of a RICO claim?



1           **MR. JURATA:** If bid rigging is -- so, Your Honor, my  
2 understanding of bid rigging is when you have horizontal  
3 competitors who are deciding which one of them is going to  
4 submit a low bid in order to win a contract.

5           Again, a horizontal conspiracy, in that scenario, if  
6 it meets all the other criteria of a RICO claim, which is more  
7 than just the fact that wireless communications -- wireless  
8 communications are used, you would need to show a -- you would  
9 need to show that -- you know, in other words, Your Honor,  
10 merely satisfying the racketeering activity element does not  
11 make a RICO claim.

12           You must demonstrate all of the other things that that  
13 statute requires, one of them being demonstrating that there is  
14 a nexus between -- between an enterprise, which in this case is  
15 alleged to be ACV, and the alleged racketeering activity.

16           And -- and that -- and that -- just in arguing, Your  
17 Honor, that supposedly high level management personnel are  
18 involved, does not -- does not convert a legitimate business  
19 entity into a -- into a criminal enterprise.

20           So the three flaws of the RICO claim, again, are the  
21 failure to -- the failure to plead the alleged racketeering with  
22 the particularity, which is required under Rule 9(b); the lack  
23 of a nexus between a legitimate business activity and alleged  
24 racketeering activity; and, again, a failure to allege how the  
25 alleged scheme harmed plaintiffs.

1           Can, Your Honor -- I can start with the nexus point,  
2     but I think it might be more logical to start with the -- with  
3     the alleged racketeering activity, because I think it sets up  
4     the discussion on the -- on the nexus point, if that's -- that  
5     is okay with you.

6           **THE COURT:** Well, let me -- let me ask you about my  
7     last question.

8           You said, you know, it has to be criminal activity. I  
9     think it has to be illegal activity, but bid rigging is probably  
10    not in every case a crime.

11          It's a form of fraud. And there is a reason why we  
12    have a criminal RICO statute and its civil counterpart.

13          So you -- you kind of caught my attention when you  
14    were like and there's got to be a crime, and there's got to be a  
15    crime. I'm not so sure I agree with that.

16          **MR. JURATA:** Yeah. So -- so, Your Honor, you are --  
17    you are correct. I did not mean to mislead you.

18          It's illegal activity is the proper -- is the proper  
19    standard there. And I -- and I apologize if I did anything to  
20    suggest otherwise.

21          The point, though, that I was making about bid  
22    rigging -- and, again, what is pled in this complaint is not bid  
23    rigging.

24          **THE COURT:** I understand.

25          **MR. JURATA:** I'm not quite sure what is pled in this

1 complaint, but it is certainly not bid rigging.

2 But, Your Honor, if you -- the point I was trying to  
3 make is that bid rigging might meet the racketeering element of  
4 the statute, if pled properly, but that does not make a RICO  
5 violation, because there are other things that have to -- to be  
6 established.

7 And some of those other things that have to be  
8 established is what is the problem here with the second amended  
9 complaint.

10 Most notably, other than -- other than the fact that  
11 the allegations are incredibly vague and generalized and  
12 conclusory for what is assessed on a Rule 9(b) legal standard,  
13 but you also have a situation in that there is no nexus.

14 And maybe I will turn to that, Your Honor. There just  
15 simply is no nexus between ACV, as the alleged enterprise, and  
16 the predicate acts which make up the civil RICO claim.

17 And so when you turn to paragraph 94 and thereafter in  
18 the complaint, where it talks about what the predicate acts are,  
19 it is very clear, again, that we are talking about alleged shell  
20 bidding involving Mr. Malchak on Sun Auto vehicles.

21 And that is -- that is the alleged illegal activity  
22 that the enterprise is supposedly -- has a nexus with. And, you  
23 know, the Second Circuit has said in the First Capital Asset  
24 Management case that there -- you know, there has to be this  
25 nexus between what is alleged to be the enterprise and what is

1 alleged to be the racketeering activity.

2 And if a complaint -- and a complaint does not state a  
3 RICO claim merely by alleging that there is racketeering  
4 activity and then denominating a legal entity as the enterprise.

5 Instead, what plaintiffs are required to do is to  
6 provide proof of the specified relationship between the  
7 racketeering acts and the RICO enterprise.

8 And not surprisingly here, Your Honor, since this  
9 started off as an anti-trust claim, the alleged facts behind the  
10 RICO claim is this alleged conspiracy, again, that -- that we  
11 have been speaking about in which paragraph 29 of the complaint  
12 makes clear is a conspiracy that involves the passing of the  
13 floor price allegedly from Mr. Malchak to Mr. -- to Sun Auto.

14 And nowhere in paragraph 29 of the complaint does  
15 it -- does it say that ACV is involved in any way, face -- or  
16 any fashion in facilitating the transfer of the -- of the floor  
17 price.

18 In fact, the only -- the only fair inference coming  
19 from paragraph 29 is is that if the floor price is being passed,  
20 it's being passed directly from an employee at Sun Auto to  
21 Mr. Malchak. Conspicuously absent there is ACV.

22 Why is that important? Because ACV is the alleged  
23 enterprise. Again, the wrongful conduct here that's being  
24 alleged is the fact that Mr. Malchak knows the floor price.

25 ACV is not used in the complaint. ACV is not used in

1 any way, shape or form in transferring the floor price to  
2 Mr. Malchak in the alleged activities regarding ACV that are  
3 contained in the complaint.

4 And you referred to some of them earlier, Your Honor,  
5 with the supposed app or the fact that management from ACV is  
6 alleged to have bid on vehicles.

7 None of those allegations go to the very specific  
8 common scheme in which Mr. Malchak is supposedly bidding on  
9 vehicles that he has the floor price.

10 None of those generalized allegations go to that. And  
11 so absent there being a connection, as you already noted, Your  
12 Honor, high level management positions are not enough.

13 The DePenguin (phonetic) case is very clear that a  
14 high ranking position does not in and of itself create an  
15 adequate nexus.

16 And, therefore, the lack of a nexus between the  
17 alleged scheme and ACV is fatal -- it's fatal to the RICO claim.

18 The other problem with the RICO claim, Your Honor, is  
19 similar to what we talked about with anti-trust standing and  
20 that is that the plaintiffs have to demonstrate that they have  
21 been harmed by this alleged racketeering activity, which has  
22 been -- which is what is supposed to be pled with particularity.

23 And we've already talked about that the only  
24 allegations that are pled with particularity are transactions  
25 which resulted in either Mr. Malchak purchasing the car or there

1 not being a sale.

2 And in that situation, Your Honor, the plaintiffs  
3 cannot -- the plaintiffs cannot demonstrate that they have been  
4 harmed.

5 Their conclusory allegation in paragraph -- I think it  
6 was paragraph -- forgive me for one moment, Your Honor, I want  
7 to make sure I'm giving you the right paragraph now.

8 I can't find it. But, Your Honor, you referred to a  
9 very general paragraph earlier in which -- in which plaintiffs  
10 have a very conclusory allegation that bidders -- and, notice,  
11 it says bidders -- not even plaintiffs -- bidders paid more than  
12 they otherwise would have, because of this alleged scheme.

13 But the point being is that that is very -- that is so  
14 vague, it doesn't satisfy 9(b).

15 And then, again, if you get to what there actually is  
16 detail about, those are all transactions that plaintiff didn't  
17 purchase.

18 And so there is no way -- if you look at the  
19 allegations that are pled with any particularity, it's clear  
20 that in none of those 906 transactions were plaintiffs injured,  
21 because they did not purchase the car and they don't have a  
22 right to purchase the car below the floor price, so there is no  
23 way in which they could be injured.

24 Unless you have any further questions, I can move to  
25 the State law claims, Your Honor.

1           **THE COURT:** I'm going to reserve on the State law  
2 claims, because if the Court does not have Federal question  
3 jurisdiction, we are not going to be getting to the State court  
4 claims.

5           And I want to hear more about that. We'll have  
6 supplemental argument in the course of this same proceeding when  
7 we get there.

8           But I first want to hear about the anti-trust claims  
9 and the RICO claims, so I'm going to turn to plaintiffs at this  
10 point.

11           **MR. YANKELUNAS:** Thank you, Judge. If I could, Your  
12 Honor, I can make the point that with regard to the 906  
13 transactions, what happened there is that when Mr. Malchak was  
14 the high bidder below the floor -- floor price -- you have to  
15 have a bidder above the floor price to have an automatic sale,  
16 but he's below the floor price and he's the high bidder.

17           And so the seller offers him the option to buy and he  
18 doesn't buy. He doesn't buy in 94 percent of those  
19 transactions.

20           We submitted that, Judge, for a specific reason which  
21 is circumstantial facts supporting an implied agreement. And it  
22 also showed that Mr. Malchak never intended to buy the cars. He  
23 was bidding because he was shill bidding.

24           Now, we've alleged in our complaint that ACV had to  
25 know about that. It had -- they had the option to terminate his

1 account and did not terminate the account.

2 The letter -- they let it continue presumably because  
3 they were part of it and aware of it.

4 Also, we alleged -- and, specifically, that an  
5 employee brought this to the attention of management. And then  
6 as you point out, they just said mind your own business,  
7 basically.

8 So, yes. I agree with my opponent. We haven't  
9 alleged a direct agreement, but we have alleged an implied  
10 agreement, based on these circumstantial facts.

11 There is -- and one thing that I haven't heard from my  
12 opponent yet in any great detail, there was a pervasive practice  
13 at ACV involving high level management, including their own  
14 participation.

15 People are warned not to bid, because you can -- you  
16 could be injured because of shill bidding. The president of the  
17 company was a participant.

18 The practice involved at least half of the sellers on  
19 the online platform.

20 **THE COURT:** So --

21 **MR. YANKELUNAS:** I know that --

22 **THE COURT:** -- let me stop you there, because we need  
23 to stick with what the second amended complaint actually says.

24 So I -- I am -- I -- with this kind of motion accept  
25 the well pleaded factual allegations as true. Bidwell and



1 Twombly actually say this isn't a heightened pleading standard.

2 It's got to be plausible. It's got to kind of kick  
3 the can across the line, but I'm not assessing credibility or  
4 doing a deep dive on whether the facts make absolute sense.

5 So taking your facts as true, I agree there is a  
6 problem. There is also a problem in the way the claims are pled  
7 because your opposing counsel is right with regard to your  
8 anti-trust case, you hang your hat on a horizontal price fixing.  
9 And it looks like, at best, vertical price fixing.

10 So if it is vertical price fixing of the some form  
11 then you need to have a product market and you need to have a  
12 geographic market. You need to have harm to the plaintiffs.  
13 You have to have harm to competition. And I'm not seeing that  
14 in the complaint right now.

15 So kind of just getting to those fundamentals, where  
16 am I going to find that in the complaint.

17 **MR. YANKELUNAS:** First, Judge, can I refer to the  
18 Gelborning (phonetic) decision, which I briefed. I think it's  
19 important because that's subsequent to the Supreme Court case  
20 that my opponents are speaking about.

21 It's a 2015 Second Circuit case, where the Court makes  
22 the point that any agreement which results or any conspiracy  
23 which results in prices that don't reflect -- reflect ordinary  
24 market conditions is per se illegal.

25 Now, bid rigging, for sure, is per se illegal. I

1 could -- I would like to cite a case showing that shill bidding  
2 is per se illegal, but I don't know why it wouldn't be.

3 I know there is earlier cases where the courts have  
4 said -- and I've cited them -- it doesn't matter whether it's  
5 vertical or horizontal, so long as it's really a per se case.

6 Now, with regard to --

7 **THE COURT:** So, so here's my pushback on that. I  
8 agree, that any time you are talking about prices that is in the  
9 heartland of anti-trust law and that is something that is very  
10 concerning to me.

11 The fact that there has never been a shill bidding  
12 case that has declared it a per se violation to anti-trust laws  
13 is also concerning to me, because the most recent anti-trust  
14 juris prudence from the Supreme Court is we are creating no per  
15 se categories.

16 So don't come up with novel per se categories most of  
17 this stuff is rule of reason.

18 And there is a recent case from the Supreme Court that  
19 says vertical price restraints, price fixing, is rule of reason.

20 So I'm asking you, tell me how this is -- is  
21 horizontal. How is this between competitors? Who is agreeing  
22 across, on the same level of the market.

23 **MR. YANKELUNAS:** Judge, I don't think I can say that.

24 **THE COURT:** Okay.

25 **MR. YANKELUNAS:** I think what I can say, though --

1 there is -- there is I've cited the case in my brief. I don't  
2 have the cite in front of me now, Judge.

3 But one of the abbreviated versions of the rule of  
4 reason is what's referred to as the quick -- I think it's the  
5 quick look --

6 **THE COURT:** Yes.

7 **MR. YANKELUNAS:** -- approach. And that's where, as I  
8 understand it, Judge -- I think this is correct -- where the  
9 impact on the market is so easily ascertainable that can satisfy  
10 the rule of reason.

11 And that's -- and I know -- know we're coming back to  
12 the same problem, Judge. I agree, if I had a Second Circuit  
13 case law on shill bidding, I would have cited it, but I don't  
14 know what else this could be, other than an adverse impact on  
15 the market.

16 When you have got people -- and, again, the claim is  
17 not limited by any means to the 906 transactions in those  
18 exhibits.

19 **THE COURT:** Well --

20 **MR. YANKELUNAS:** We don't know --

21 **THE COURT:** -- let me -- let me talk to that. And --  
22 because I've given careful thought to your claims.

23 And I agree that we're in -- we're talking about price  
24 and we're talking about if there is shill bidding going on that  
25 would be concerning, but this is what I'm hearing from opposing

1 counsel and it has some traction.

2 What Mr. Malchak is doing is not purchasing the  
3 vehicles, so these -- these other plaintiffs aren't purchasing  
4 it either.

5 The other consumers aren't purchasing it. He's got  
6 kind of an insider's game, so he is not accepting prices on his  
7 vehicles that he doesn't want to accept.

8 And I -- I don't think it would be too hard to explain  
9 how that's not good for the market, but tell me how your clients  
10 are injured in that respect.

11 If he is not consummating the purchase and the  
12 purchase isn't going through for anyone, how are they bidding  
13 more on his cars?

14 **MR. YANKELUNAS:** Judge, it may be simply my unartful  
15 drafting on my part and that's probably what it is, but I we're  
16 not we're not connecting on this point, Judge, let me try again.

17 **THE COURT:** Okay.

18 **MR. YANKELUNAS:** If you would allow, the specific  
19 reasons for submitting those exhibits was to show not that these  
20 are the transactions at issue by any means, because there is  
21 probably thousands of transactions at issue.

22 The only reason I and the -- and the specific reason I  
23 submitted that, Judge, is to show that it confirms that Malchak  
24 was bidding without the intention of buying.

25 And also it confirms that ACV had to know about it,

1 had the option to terminate his account and didn't do it because  
2 they knew about it and agreed to it.

3 **THE COURT:** Okay. Well, let me stop you there. And  
4 all that's pled.

5 What is not pled is that Sun Auto -- you -- you say  
6 it's the largest customer, but you don't talk about the  
7 percentage of transactions this involves.

8 And you don't explain why, if somebody's on this  
9 website, they can't just go somewhere else. Why are they at  
10 this website? Why is it important to be doing here and if --

11 **MR. YANKELUNAS:** This is --

12 **THE COURT:** -- the biggest customer is conspiring with  
13 the platform operator.

14 So that 90 percent of the transactions on the platform  
15 are driving up the price and are tainted, that would be one  
16 thing, but those kind of allegations are not in the second  
17 amended complaint.

18 **MR. YANKELUNAS:** This is the -- of course they can go  
19 wherever they want to bid on the cars.

20 And I -- this was the argument that the defendants  
21 make about my position on having any economic sense.

22 The argument, as I understand it, all -- all the buyer  
23 has to do is go someplace else to get a more competitive price.

24 The problem with that is they don't know who is shill  
25 bidding and who is not. They don't know that the price is

1 affected -- the prices that they are going to get on the ACV  
2 platform are affected by shill bidding and they don't know if  
3 ACV Corporation shill platform will be affected by shill  
4 bidding.

5 They just don't know that it's still objectively  
6 unfair for shill bidding to happen. So that bidders, like the  
7 plaintiffs, are being enticed into thinking there is competition  
8 and enticed in a bidding war, where they otherwise wouldn't and  
9 that's -- that's the damage --

10 **THE COURT:** So --

11 **MR. YANKELUNAS:** That --

12 **THE COURT:** -- I've got that and that sounds like an  
13 unfair business practices State law claim.

14 So it's not like that the Court is saying there is  
15 nothing wrong, but if you want to shoehorn it into anti-trust or  
16 RICO, there are requirements.

17 And if I start with the premise that this looks to me  
18 like a vertical price restraint -- because I'm not hearing about  
19 any agreement between competitors.

20 And if -- if we accept the premise that the U.S.  
21 Supreme Court -- I -- I hope nobody is listening, but never  
22 mind -- what the Second Circuit says, the U.S. Supreme Court  
23 says vertical restraints are analyzed under the rule of reason,  
24 I need to be able to look at that complaint and say, okay. Here  
25 it is.

1           So that's the problem. It's not that there isn't a  
2           cause of action. It's just it needs to be a Federal question.

3           **MR. YANKELUNAS:** But, Your Honor, if I could -- I  
4           don't think the Gelborning case could be read in the way that my  
5           opponents and Your Honor is presenting this.

6           Because the -- and I read the Gelborning case -- and  
7           the reason I cite it is because I think it is saying  
8           irrespective of vertical or horizontal, if you have -- and you  
9           start -- you start with the market and you start with the price.

10          And if you have got a conspiracy and it's  
11          wrongdoing -- and I know it has to be wrongdoing -- if you start  
12          with an agreement or conspiracy that has the effect of changing  
13          the price in a way that it no longer affects the market, that's  
14          a per se wrong per se violation.

15          I think that's -- I think I think that's correct,  
16          Judge. I agree on -- I mean, this is not an agreement among  
17          competitors.

18          I -- I'm not sure the London case or the Sierra  
19          Santara (phonetic) case -- I don't have their cites in front of  
20          me, Judge, are limited to horizontal.

21          But I know we've got a problem with we've got -- I've  
22          alleged activity that results in a price that doesn't reflect  
23          the market.

24          And I think that's fundamentally a per se violation.  
25          I think that also -- I mean, we -- we come -- we come back to

1 the quick look review, which I don't think you even had to do if  
2 you have got a per se violation. In fact, I'm sure of that.

3 But even under the quick look review, if you've got an  
4 impact -- an impact on the market that's easily entertainable --  
5 ascertainable and obvious like this would be, I think you get  
6 past the problem we're talking about.

7 **THE COURT:** Okay. So tell me how the consumer's  
8 paying a higher price because of this.

9 **MR. YANKELUNAS:** The consumer is being led -- well,  
10 think of think of the people bidding on a painting at  
11 Christie's.

12 There's a fake bidder. Somebody wants the -- wants  
13 the painting and that person bids 50,000. The fake bidder bids  
14 60,000 and the next bid is 65,000, it's really the same -- the  
15 same scenario here.

16 We've got a bidder who likes the car, bids a price,  
17 doesn't get it because he hasn't met the floor price or what he  
18 hasn't met is the proxy bid.

19 Really, that's the -- that's the correct term -- he  
20 hasn't -- he hasn't met the proxy bid of whether it's Malchak or  
21 somebody else.

22 And because of that, he's not the successful bidder  
23 because he had to keep bidding up.

24 **THE COURT:** All right.

25 **MR. YANKELUNAS:** He's got to surpass the fake bid.



1 He's bidding more than he otherwise would. That's really as  
2 simple as that.

3 And when he is the successful bidder, he's paying more  
4 than he would. But without the shill bid, that's -- and that no  
5 longer affects the market.

6 That no longer -- that no longer reflects on market  
7 price and that's an anti-trust violation, I believe, Judge.

8 And there is an anti-trust injury which -- which is  
9 also -- which we've alleged in paragraph 60 and 61 of the  
10 complaint -- that's the economic crux of the injury is the  
11 excessive price that the plaintiffs and the punitive class  
12 members are paying.

13 **THE COURT:** Okay. You want to say anything more about  
14 the anti-trust claim or do you want to move on to RICO?

15 **MR. YANKELUNAS:** Unless, Your Honor has any questions,  
16 I'll just go on to RICO now.

17 **THE COURT:** Okay.

18 **MR. YANKELUNAS:** And I think ACV -- we allege ACV is  
19 the enterprise. ACV owns the Internet website, owns the -- the  
20 platform which is used to make the wire -- the engage in wire  
21 fraud. It's the economic instrument.

22 It's a separate -- it's separate from the actors --  
23 the individual RICO defendants. We don't name ACV as a -- in  
24 our RICO count.

25 We name the -- we name the individual managers who

1 we've named. We've also named Todd Caputo, who was a former  
2 owner of Sun Auto.

3 I think the Dornberger case is a key and is really  
4 important in our setting, Judge, Dorn -- and it ties into the  
5 allegation the complaint and it's definitely there, Judge in  
6 detail that there was a pervasive companywide practice ongoing  
7 for months or actually years.

8 It involved actual participation of high level  
9 management. Not just knowledge, but participation and it's an  
10 important distinction.

11 In Dornberger the Court said it's not necessary to go  
12 beyond proving or pleading that kind of a companywide practice  
13 in order to tie the individual corporate defendants -- RICO  
14 defendants into the -- into the -- a scheme.

15 And we've done -- we've alleged that in your -- in our  
16 RICO count and I think Dornberger supports our position.

17 **THE COURT:** What about my point that you can't -- you  
18 know, you have the RICO enterprise as ACV and you have the RICO  
19 defendants, with the exception of Mr. Caputo, as the enterprise  
20 defendants' employees.

21 And the Second Circuit says you can't -- those can't  
22 be the same thing. It has to be a distinct entity, because the  
23 corporation always works through its employees and officers.

24 So what about that concern?

25 **MR. YANKELUNAS:** Judge, I'm missing your point. I was

1 thinking about -- can you run that by me one more time.

2 **THE COURT:** Sure.

3 **MR. YANKELUNAS:** I'm sorry.

4 **THE COURT:** You -- in your plaintiff's RICO statement,  
5 you tell me that ACV is a corporation, which is the RICO  
6 enterprise, as that term is defined in the statute.

7 And then you tell the Court that defendants Neiman  
8 Chamoun and Magnuszewski are employed by ACV. Chamoun is the  
9 CEO. Neiman is the chief customer success officer and  
10 Magnuszewski is chief technology officer and those are defined  
11 in -- on paragraph two, as the RICO defendants, with the  
12 exception of Mr. Caputo.

13 And so I read from you -- I read to you from the  
14 Second Circuit that you can't have the RICO entity and its  
15 operating officers as distinct, because they are one in the  
16 same.

17 And I can read it to you again, but that's what almost  
18 every circuit has found and I haven't found anything that says  
19 differently.

20 So employees, acting in the course of their employment  
21 and on behalf of the corporation, they do not form an enterprise  
22 distinct from the corporation.

23 So you can't -- that can't be the -- the people who  
24 are acting in violation of RICO, if it's one in the same.

25 **MR. YANKELUNAS:** I guess my response to that, Judge,

1 would be the Capital 7 Funding case. That's a 2020 Eastern  
2 District of New York case, where the Court found -- that held  
3 the people like Caputo -- I'm sorry, people like Neiman and  
4 Chamoun responsible under RICO under vicarious liability.

5 **THE COURT:** And that's a District court case?

6 **MR. YANKELUNAS:** I'm sorry, Judge.

7 **THE COURT:** That's a District court case?

8 **MR. YANKELUNAS:** It's a -- this is -- this is a 2020  
9 Eastern District of New York case.

10 **THE COURT:** Yes, but how would that trump the Second  
11 Circuit?

12 **MR. YANKELUNAS:** I don't think it would, Judge.

13 **THE COURT:** Okay.

14 **MR. YANKELUNAS:** Although I'm not still not really --  
15 I'm not agreeing with what I'm hearing, but I'm not going to  
16 challenge you, Judge, if you read the decision and that's what  
17 it says.

18 As I understand what you are saying, Judge, is that --  
19 and that would leave me with wondering how we would ever have a  
20 RICO claim involving a corporate -- a corporate party and  
21 individual managers.

22 Because we've got -- I think what I'm hearing, Judge,  
23 is that you can't have a RICO claim if the corporation and the  
24 individual defendants are in the case, but how else could you  
25 ever have a RICO claim with a corporate defendant being

1 involved?

2 Because we've got a corporate defendant. It's the  
3 economic instrument being used to prosecute this wire fraud.  
4 You've got individuals who are associated with it, who manage  
5 the company. And by virtue of their management of the company  
6 are tied -- are tied to the fraud.

7 And if that doesn't support a RICO claim then how  
8 could you ever have a RICO -- a RICO claim, when you have a  
9 corporate defendant as the enterprise?

10 **THE COURT:** Because you could have the corporate  
11 defendant working with another party.

12 So it's -- for example, my dairy farmers case is a  
13 good example of there could be a claim. It just might not be  
14 alleged the way it should be.

15 So the first iteration of the complaint was DFA, Dairy  
16 Farmers of America is conspiring with DMS, Dairy Marketing  
17 Services. And they are getting together and depriving the dairy  
18 farmers of the fair price for their milk.

19 The problem with that is a corporation cannot conspire  
20 with a wholly owned subsidiary, because they are one in the  
21 same.

22 So I want you to address my concern that there is case  
23 law that talks about employees acting in the scope of their  
24 employment on behalf of the RICO enterprise.

25 They are the RICO enterprise. That's how the RICO

1 enterprise works. And you've defined them as RICO dependents --  
2 defendants, separate and apart from the corporation.

3 **MR. YANKELUNAS:** I did that, Judge, because I know  
4 that. And maybe I'm now -- I'm hearing maybe I'm wrong.

5 But I -- it's my understanding that the RICO  
6 enterprise has to be separate from the RICO defendants who I  
7 have named.

8 They -- they used the RICO enterprise as a means by  
9 which to engage in their conspiracy. The RICO enterprise itself  
10 is a corporate entity, who is -- who is the vehicle for the  
11 fraud. I don't think it's the -- it's the -- the participant in  
12 the fraud.

13 **THE COURT:** Okay. So -- so this is Riverwoods  
14 Chappaqua Corp versus Marine Midland Bank, 30 F.3d 339, 1994  
15 case.

16 And I just did a quick search before we came out on  
17 the record and it looks like all the circuits are in agreement.

18 And I'll just read the head note to you and I'm just  
19 asking if you can distinguish this case.

20 Employees of corporation associating together to  
21 commit pattern of predicate acts in course of their employment  
22 and on behalf of corporation does not result in formation of  
23 enterprise distinct from corporation for the purpose of civil  
24 enforcement claim under RICO, in light of the fact that  
25 corporation can function only through its employees and agents,

1 so that any act of corporation could be viewed as act of such  
2 enterprise.

3 And the conclusion was that these cannot be distinct  
4 from the corporation -- the corporate enterprise itself.  
5 Evidence did not establish that the alleged association of fact  
6 enterprise consisting of bank corporation and its officers was  
7 distinct from corporation for the purposes of showing  
8 corporation's participation in the affairs of enterprise, as  
9 required to maintain civil enforcement claim under RICO.

10 **MR. YANKELUNAS:** Okay. Judge, I think what's  
11 different about this case and also I think makes it unusual is  
12 that we've got Neiman -- Joe Neiman, who not only was in this  
13 area that you're finding fault with -- which I'm hearing -- you  
14 know, using this position of corporate manager to engage in  
15 wrongdoing, but he also engaged in wrongdoing in his own  
16 personal capacity.

17 And maybe that means he would be the one RICO  
18 defendant to still be in the case. I'm not sure. And also,  
19 Magnuszewski helped him, according to our allegations, and  
20 that's in the complaint, with creating this personal app, so he  
21 can engage in wrongdoing.

22 He's not -- so Neiman isn't just accused of doing a  
23 wrongdoing in a corporation sense as a president. He's also  
24 engaged in a wrongdoing in his own personal capacity and I think  
25 that has to be dealt with somehow in this case.

1           **THE COURT:** Well, let me ask you about opposing  
2 counsel's other point, which was -- okay. Even assuming that  
3 you have the right defendants, there is no allegation that ACV  
4 is the party that is disclosing the floor bid to Mr. Malchak.

5           That doesn't seem -- there is just -- there is just no  
6 allegation in the complaint that that's how it's happening.

7           **MR. YANKELUNAS:** Judge, right. Paragraph 20, you read  
8 this earlier -- on paragraph 25, we do allege that by agreement  
9 between Sun Auto, ACV and Malchak, they are engaging in shill  
10 bidding.

11           I don't have -- at this point -- and I'm going to need  
12 discovery to get it, I'm sure. At this point I don't have  
13 specific information as to an agreement between Sun Auto and  
14 ACV.

15           I'm -- I think it can be inferred and has to be  
16 inferred based on the facts we've alleged in the complaint.

17           **THE COURT:** Right. Right. But you have carefully  
18 pled it. And as appropriately so, because it's based on  
19 information and belief, but you are not alleging that ACV is the  
20 one who disclosed it.

21           So it says in paragraph 25: Upon information and  
22 belief, by prior agreement with ACV and Sun Auto, the Sun Auto  
23 floor price price of the vehicle being offered for sale by Sun  
24 Auto using ACV online platform was disclosed to Malchak.

25           And with knowledge of that information, Malchak



1 presented an phantom proxy bid at a price below the floor --  
2 floor price for the purposes of causing competing bids to  
3 increase the shill up, with no intention of purchasing the motor  
4 vehicle being offered for sale by Sun Auto.

5 So there is an agreement of some sort between ACV and  
6 Sun Auto, but why isn't it Sun Auto that's disclosing it to  
7 Malchak?

8 **MR. YANKELUNAS:** Again, Judge, I don't think without  
9 discovery I'm really able to get that particular -- I mean, I'm  
10 going to have to get discovery to get that information.

11 I know that something wrong is happening here. I  
12 think it's pretty clear something wrong is happening here.

13 It hasn't been denied. I think that I pled sufficient  
14 circumstantial facts to imply both the agreement and the scheme  
15 and a conspiracy.

16 And I am going to need discovery to get more of the  
17 detail that we're talking about. I wish I had it now. If I had  
18 it, I would have pled it.

19 But I know that -- I think the way paragraph 25 reads,  
20 you can't exclude the possibility -- possibility that it came  
21 from ACV.

22 I don't know exactly how it happened yet, but it  
23 happened. I mean, we -- we know -- I -- we know that --

24 **THE COURT:** So sometimes the answer to that is before  
25 you allege RICO, you do your discovery and then you bring a RICO

1 claim, because that does have a rigorous standard of pleading.

2 And that's why they have to have a separate RICO  
3 statement and then you make the RICO claim, because by that time  
4 you have the evidence that you need to make the allegations  
5 particularized, which they need to be.

6 **MR. YANKELUNAS:** I think -- I think I had enough on my  
7 plate, Judge, to conclude that based on the evidence of the  
8 wrongdoing and the documents that I've seen, the allegations  
9 with regard to pervasive conduct and wire fraud, the case law  
10 telling me that that bid rigging is always a per se violation,  
11 and it's -- it's an improper conduct, I had enough where I  
12 needed to plead the RICO claim.

13 I'd like to be able to plead more facts. I'm going  
14 to -- I am going to need more discovery to -- to flesh this out  
15 and it's going to be a long --

16 **THE COURT:** You think this --

17 **MR. YANKELUNAS:** -- a long process.

18 **THE COURT:** Do you think -- do you think this is bid  
19 rigging?

20 **MR. YANKELUNAS:** No. No. I mean, I think the harm --  
21 I think it's similar in that it's improper, but a different kind  
22 of harm to the market.

23 I mean, it's a different -- I mean, it's -- I agree  
24 with my opponent. Bid rigging is typically horizontal among  
25 among competitors.

1           This is -- I don't know if this -- this is -- it's an  
2 unusual situation because we've got Malchak and Sun Auto really  
3 being on the same level.

4           And I don't know that I can really say that ACV is on  
5 a different level, because they are part of the same structure.  
6 They are -- they are part of the -- these group of people --  
7 this group, which is selling.

8           And then Malchak is in league with Sun Auto and  
9 affecting how this -- these transactions will happen. And it's  
10 people like the punitive class members and the lead plaintiffs  
11 in our case that have no idea this was going on.

12           They would have no way of knowing it's going on and  
13 they are hurt because they are bidding more than they otherwise  
14 would, because they are being enticed into bidding more than  
15 they otherwise would by the shill bidding.

16           **THE COURT:** Anything else that you want to say before  
17 I give opposing counsel the last word?

18           **MR. YANKELUNAS:** No, Judge, thank you.

19           **THE COURT:** Thank you.

20           **MR. JURATA:** Thank you, Your Honor. This is -- this  
21 is Jay Jurata again. Just a couple points is I believe -- I  
22 believe that the statement was made that the reason why it would  
23 be proper to infer an agreement here is because Sun Auto  
24 provides Malchak the option to buy and Mr. Malchak doesn't  
25 exercise on that.

1           And I think that that statement needs to be contrasted  
2 with what is actually alleged in the complaint. And if you take  
3 a look at paragraph 20 of the complaint, it's very clear, again,  
4 that if a bid comes in below the floor price, the seller has the  
5 option to accept the highest bid.

6           Nowhere does it say that the seller has to accept the  
7 highest bid. And if you go to paragraph 30 of the second  
8 amended complaint and 31, you -- it's very interesting what  
9 is -- what is actually being pleaded in these two paragraphs.

10           So in paragraph 30 it states that -- it says: The  
11 reason why this court should conclude that this is shill bidding  
12 is because Mr. Malchak was bidding with no intent to purchase.

13           And then -- and I'm sorry, Your Honor, I meant to say  
14 31 and 32. Paragraph 31 again reiterates that if Sun Auto  
15 receives a bid that is below the floor price, that the seller  
16 has the option to accept the highest bid.

17           Again, nowhere does it say that the seller must do the  
18 bid.

19           **THE COURT:** Does it have to say that?

20           **MR. JURATA:** And --

21           **THE COURT:** Does it have to say must?

22           **MR. JURATA:** No, Your Honor. I can answer that by  
23 pointing at paragraph 32, because here's where it's important.

24           The allegation in paragraph 32 says that on many  
25 occasions during the class period Malchak was the high bidder on

1 Sun Auto vehicles, which did not automatically sell on the ACV  
2 auction platform.

3 So that means it came below the floor price and  
4 Malchak declined the offer to purchase the Sun Auto vehicle.

5 What's critical here, Your Honor, is nowhere in the  
6 complaint does it say that Sun Auto gave Mr. Malchak the ability  
7 to purchase below the floor price, except for those couple  
8 transactions in exhibit -- in Exhibits A through C, where --  
9 where it says counter accepted.

10 Which means that there was a counteroffer below the  
11 floor price. So the important point here is we can't infer an  
12 agreement from the mere fact that Mr. Malchak did not purchase  
13 vehicles that he bid on which were below the floor price.

14 There needs to be something -- there needs to be some  
15 factual allegation that to -- to be comfortable that Sun Auto  
16 actually gave Mr. Malchak the option to purchase and Mr. Malchak  
17 declined and there is none of that.

18 Your Honor, so -- so you -- in -- and it would be  
19 wrong to infer an agreement from the fact that Mr. Malchak  
20 didn't purchase, because it hasn't been established that he was  
21 even given the option to purchase beyond that, Your Honor.

22 **THE COURT:** Well, he had the option to purchase. He  
23 wasn't compelled to purchase.

24 **MR. JURATA:** No, no, Your Honor. He doesn't have the  
25 option to purchase. The only the entity with the option is the

1 seller.

2 **THE COURT:** Right.

3 **MR. JURATA:** The seller has to --

4 **THE COURT:** So that's what it means. He has the  
5 opportunity if the seller gives him and -- and --

6 **MR. JURATA:** That's --

7 **THE COURT:** -- he doesn't consummate it. And you are  
8 telling me he doesn't consummate it, because the seller pulled  
9 away and we have to have that fact.

10 **MR. JURATA:** No, Your Honor. What I'm telling you is  
11 that there is no allegation that the seller gave him the option.

12 There is the sole option here. Again, the seller is  
13 saying I'm going to sell a car for one and my floor price is one  
14 thousand dollars.

15 And let's say the bidding for that car was five  
16 hundred dollars. If the seller doesn't like that five hundred  
17 dollars, the seller can walk away and say I will try to auction  
18 that car another time.

19 Now, of course, the seller has the option to say I  
20 will take that five hundred dollars. And there are important  
21 facts outside of the pleading here, Your Honor, as to what  
22 happens in that circumstances.

23 But putting that aside -- actually, no. You can see  
24 that because you see that on Exhibit C -- the Exhibit C allows  
25 me to say this.

1           Exhibit C says for certain transactions counter  
2     accepted. What that means is that the seller accepted the high  
3     bid. And in that situation, the car is automatically sold.

4           The only time there is an option that happens is when  
5     it goes back and forth, if there is a counter made above that  
6     high -- above that high bid, that's still below the floor price.

7           And if there is no meeting of the minds, you end up  
8     with no sale, which is -- which is -- which are the transactions  
9     under Exhibit A, which are the ones that state -- please bear  
10    with me, Your Honor -- the ones that state counter original  
11    declined.

12          So, again, what's important here is -- is that  
13    Mr. Malchak does not have the option to purchase any vehicle  
14    below the floor price, unless the seller gives him that option.

15          And what is missing from the second amended complaint  
16    is any allegation indicating that the seller was willing to  
17    accept the price below the floor bid.

18          And, again, this is why the Supreme Court says you  
19    have to be very careful in finding an agreement, because there  
20    is another equally rationale explanation as to what happened  
21    here, which is that Mr. Malchak bid the highest he was willing  
22    to pay and that was below the price of what Sun Auto was willing  
23    to accept.

24          Except for the few transactions in Exhibit B and  
25    Exhibit C, which show that Sun Auto accepted that below -- that

1 below floor price.

2 But moving beyond that, Your Honor, to the allegation  
3 of pervasiveness that it -- again, you know, despite the fact  
4 that the -- the complaint is very clear that the scheme involved  
5 sales involving Sun Auto vehicles that Mr. Malchak bid on and in  
6 response to that, it was said that you can infer an agreement  
7 here some way, because this was a -- a pervasive practice or  
8 maybe there -- that there could be a demonstrating of market  
9 harm, because there was a pervasive practice, there is a couple  
10 of problems with that argument, Your Honor.

11 First, it's totally conclusory. The improper  
12 affidavits that are before you both say that shill bidding was  
13 pervasive, yet they do not mention a single other dealership,  
14 other than Sun Auto that engages in shill bidding that makes  
15 the -- that makes the allegation that it was pervasive or  
16 happening on 50 percent of the platform completely conclusory.

17 There is no basis to infer to -- there is no basis to  
18 test that allegation at all.

19 And, in fact, the -- the affidavits which -- which  
20 attempt to inject new facts into the second amended complaint  
21 actually do the opposite, because they do not support that there  
22 is a pervasive practice, because they do not provide any  
23 identity on who allegedly -- which dealers are allegedly dealing  
24 with the shill bidding.

25 Moving to unreasonable restraint of trade, whether



1 there is a harm in the market, Your Honor, I respectfully -- I  
2 respectfully disagree regarding the Guilding decision.

3 It actually does not support plaintiff's case, because  
4 footnote 13 of that decision addresses the very -- addresses the  
5 actual Leegin decision.

6 **THE COURT:** No, it says --

7 **MR. JURATA:** And that foot --

8 **THE COURT:** It makes that clear. That's clear. It  
9 says: Although previous cases apply the per se rule to price  
10 fixing agreements, generally, the Supreme Court has clarified  
11 that the rule of reason, not a per se rule of unlawfulness, is  
12 the appropriate standard to judge vertical price restraints.

13 This has no bearing on this case, in which the  
14 appellates allege a horizontal price fixing conspiracy.

15 And, in fact, the second look approach in Apple or the  
16 quick look approach, I should say, in Apple applies only if you  
17 have one horizontal element.

18 **MR. JURATA:** Yes. It's Professor Aregan (phonetic)  
19 teaches us, Your Honor, in his leading treatise on anti-trust  
20 law.

21 And what is interesting here is that there was a  
22 reference earlier to Christie's and shill bidding happening on  
23 Christie's.

24 And I think that's important to put into concept --  
25 put into context when thinking about these claims.

1           Auctions have been around for hundreds of years.  
2           Allegations have been around that there has been shill bidding  
3           on certain auctions for hundreds of years, yet there is not a  
4           single case in the Second Circuit or otherwise that has found  
5           that to be a per se violation of the anti-trust law.

6           Something susceptible, I believe, for a quick look or  
7           even something unlawful under a full blown rule of reason  
8           analysis.

9           This is simply not the type of case which would  
10          warrant taking a shortcut from the incredibly important step of  
11          determining whether or not there was harm in a relevant  
12          anti-trust market.

13          And, Your Honor, I would go so far as to say that  
14          amending would be futile on this point. Because as made clear  
15          in the opposition, that if there was a market -- a relevant  
16          market, which would be identified, it was identified in the  
17          opposition as the ACV platform, which Your Honor is a single  
18          branded market.

19          It reads the market definition market power step out  
20          of the Sherman Act. It says that any -- anyone has a monopoly  
21          over its own product. So Safeway would have a monopoly over  
22          anything sold in the Safeway store.

23          A movie theater would have a monopoly over the  
24          concession that are sold in the movie -- during the movie. That  
25          eBay would have a monopoly over anything sold on its platform.

1           Single brand markets are disfavored under the  
2 anti-trust laws because again it reads -- it reads the whole  
3 market definition market power step out of the -- out of the  
4 Sherman Act.

5           So -- so I would respectfully request that an  
6 amendment would be futile on that point.

7           Moving to RICO, the -- the Dornberger case actually  
8 does -- actually supports the defendants' position on on the  
9 nexus point.

10           And, you know, Dornberger goes through -- and I'm  
11 sorry, not the nexus, but the particularity point. Dornberger  
12 does say that -- that a plaintiff still has to allege facts  
13 giving rise to a strong inference of fraudulent intent on the  
14 part of each defendant. That's at page 528 of the decision.

15           But also, look at the factual context of what happened  
16 in Dornberger versus here. Dornberger involved a case in which  
17 there was a criminal arrest for the alleged conduct in  
18 Switzerland.

19           There was a government investigation in Switzerland on  
20 the conduct. There was a government investigation on London on  
21 the conduct.

22           Throughout the complaint, even though there was not  
23 specifics regarding each RICO defendant, the complaint  
24 contained -- you know, in addition to the -- in addition to the  
25 criminal arrest and the Government investigation, the complaint

1 had a thorough description of the decades long scheme, including  
2 set forth the roles that each of the defendants played.

3 And plaintiff had been extremely precise, it says, on  
4 page 529, in describing the role played for the many individual  
5 defendants.

6 And there, unlike here, the role that they were  
7 playing actually went to the underlying predicate act, which is  
8 not the case here, as we've already talked about, because  
9 generalized conduct by certain ACV employees that is unrelated  
10 to the Malchak scheme, does not -- does not provide the basis in  
11 order to find a -- a RICO -- a RICO violation.

12 And, Your Honor, I would just like to close on one  
13 point. Numerous times today, we've heard -- we've heard, Your  
14 Honor, this is why discovery is needed here.

15 And I would respectfully -- respectfully say that that  
16 is not what the law allows one to do in a -- in a anti-trust or  
17 a civil RICO claim, in which there are treble damages, massive  
18 discovery and attorneys fees.

19 And the Supreme Court describes in detail in Twombly  
20 how it has to be more than something which is a mere possibility  
21 for that and there is similar authority on the RICO cases.

22 So saying that discovery is needed is putting the cart  
23 before the horse here. The -- when the Supreme Court has said  
24 this is exactly what we do not do in these types of cases.

25 So that's all I have, Your Honor, unless you have any

1 questions.

2           **THE COURT:** I don't have any questions. At this  
3 point, the Court is going to grant the motion to dismiss with  
4 leave to amend.

5           It's going to grant the motion to dismiss with regard  
6 to the anti-trust claim, because this is a vertical price  
7 restraint, at best, and that's judged by the rule of reason.

8           This is not a quick look case, because it doesn't have  
9 a horizontal component to it.

10           There is no case law that has been cited to the Court  
11 where shill bidding has been identified as a per se restraint.

12           There is no allegation of a product market. There is  
13 no allegation of a geographic market. There is no allegation of  
14 market power, in this case.

15           I'm not dismissing on the basis that the Court cannot  
16 reasonably infer an agreement, but there is nothing that would  
17 allow the Court to determine a plausible rule of reason offense,  
18 and the second amended complaint, which is pled as -- solely as  
19 a per se price fixing restraint, subject to a per se analysis.

20           With regard to the RICO claim, I'm going to dismiss on  
21 the basis of the insufficiency of the RICO statement.

22           The RICO statement identifies the RICO enterprise as  
23 ACV. It identifies defendants Neiman, Chamoun and Magnuszewski  
24 as the RICO defendants, along with Mr. Caputo.

25           But the allegations are simply that defendants Neiman,

1 Chamoun and Magnuszewski are employed by ACV. Chamoun is the  
2 CEO. Neiman is the chief customer success officer and  
3 Magnuszewski is the chief technology officer.

4 With regard to Mr. Caputo, it's only described as an  
5 investor in ACV and former owner of Sun Auto, ACV's largest  
6 customer for 2015 to 2019. Defendant Caputo is associated with  
7 ACV.

8 There has to be a distinction between the RICO  
9 enterprise and the RICO defendants. And the Court again cites  
10 the Riverwoods case.

11 So RICO, Section 1962(c) provides as follows: It  
12 shall be unlawful for any person employed by or associated with  
13 any enterprise engaged in or the activities of which affect  
14 interstate or foreign commerce to conduct or participate  
15 directly or indirectly in the conduct of such enterprises affair  
16 through a pattern of racketeering activity or collection of  
17 unlawful debt.

18 Under this section, the RICO person must conduct the  
19 affairs of the RICO enterprise through a pattern of racketeering  
20 activity.

21 We have determined that the person and the enterprise  
22 referred to must be distinct.

23 The RICO statute clearly envisions separate entities.  
24 We have made clear that by virtue of the distinctives  
25 requirement, a corporate entity may not be both the RICO person

1 and the RICO enterprise under Section 1962(c).

2 This does not foreclose the possibility of a corporate  
3 entity being held liable as a defendant under Section 1962(c),  
4 where it associates with others to form an enterprise that is  
5 sufficiently distinct from itself.

6 In this regard from its -- in this regard, we have  
7 noted that a Section 1962(c) claim may be sustained, where there  
8 is only a partial overlap between the RICO person and the RICO  
9 enterprise.

10 Nevertheless, by alleging a RICO enterprise that  
11 consists merely of a corporate defendant associated with its own  
12 employee or agents carrying on the regular affairs that the  
13 defendant, the distinctiveness requirement may not be  
14 circumvented.

15 Because a corporation can only function through its  
16 employees and agents, an action of the corporation can be viewed  
17 as an act of such an enterprise.

18 And the enterprise is in reality no more than the  
19 defendant itself.

20 Thus, when where employees of a corporation associate  
21 together to commit a pattern of predicate acts in the course of  
22 their employment, on the behalf of the corporation, the  
23 employees in association with the corporation do not form an  
24 enterprise distinct from the corporation.

25 At least as framed in the RICO statement, that is what

1 is alleged.

2 I -- I think there is persuasive traction in opposing  
3 counsel's argument that they have to establish that these  
4 individuals were engaged in the predicate acts.

5 It can't be somebody apart from the RICO defendants,  
6 Mr. Malchak, who was responsible for that.

7 I -- I am going to grant leave to amend. I can't  
8 conclude at this point in time that amendment would be futile.

9 I do understand that in an anti-trust case, there is  
10 an abundance of law that says that the evidence is likely to be  
11 in the hands of the alleged co-conspirators.

12 There is also an abundance of case law that -- that a  
13 product market and a geographic market are fact dependent --  
14 dependent criteria.

15 And that often, the Court does not dismiss on a motion  
16 to dismiss simply because the product market and the geographic  
17 market aren't defined with a great deal of specificity.

18 But in this case, and looking the second amended  
19 complaint, there is no allegation of a product market and the  
20 Court's not going to infer one from the class action  
21 allegations.

22 And there is also no allegation of a geographic market  
23 and on that basis, the claim cannot withstand a motion to  
24 dismiss.

25 Let me turn to plaintiffs and ask how much time you



1 want to file an amended complaint and then I'm going to talk to  
2 the defendants about that.

3 **MR. YANKELUNAS:** Judge, I want to make sure I'm clear  
4 on this. I know you are denying -- you are granting with leave  
5 to amend with regard to the anti-trust.

6 Is that the same ruling with regard to RICO?

7 **THE COURT:** Yes, but I would caution you to look at  
8 the RICO case law carefully, because it does need to be pled  
9 with particularity and that's why you have the RICO statement.

10 And sometimes it's just a very difficult pleading  
11 hurdle at the pleading stage. So I'm not forcing you to do it,  
12 but that is something that the Court is going to be looking for  
13 since this is the third iteration of the complaint.

14 **MR. YANKELUNAS:** All right.

15 **THE COURT:** The reason why I'm not -- I'm not going to  
16 analyze the State law claims is that the Court does not have  
17 subject matter jurisdiction. Because of Federal question, these  
18 claims belong in State court.

19 **MR. YANKELUNAS:** Right. Would 60 days be permissible,  
20 Judge?

21 **THE COURT:** Let me ask how the defendants feel about  
22 that.

23 **MR. JURATA:** Your Honor, we obviously are happy with  
24 anything that you deal -- that you feel is proper here.

25 I will note that, again, we're in a situation where

1 the exact arguments for which you are ordering dismissal were  
2 raised in defendants' first motion to dismiss and which was done  
3 back during the summer.

4 I -- and so plaintiffs have had -- have had  
5 approximately nine months to -- to evaluate these deficiencies.  
6 I think providing 60 days is -- is very generous to that --

7 **THE COURT:** Well, here's the difference is that you  
8 did raise these arguments. They did amend the complaint, but  
9 the Court did not rule on them.

10 And, typically, I would not do a ruling on the record,  
11 but I -- I feel comfortable in finding that these are not  
12 plausible claims of relief at this point in time.

13 And I did not to further delay the proceedings when I  
14 could pick out two things that I thought were kind of case  
15 dispositive.

16 With regard to both of these Federal claims, if I  
17 grant 60 days, it will not be extended thereafter. That's  
18 plenty of time and it's plenty of time to analyze these claims  
19 that fit with the facts of the case or it is this really more of  
20 an unfair trade practice -- practices or fraud claim or  
21 something else.

22 But if it's going to be 60 days, it will not be longer  
23 than that. I can't fault them for not taking you at your word  
24 in the motion to dismiss, because you advanced a number of  
25 arguments.

1           Some of which, I would have not granted dismissal on  
2   in that motion.

3           **MR. JURATA:** Understood. Your Honor, 60 days is  
4   obviously acceptable to defense.

5           **THE COURT:** Okay.

6           That work for plaintiffs as well?

7           **MR. YANKELUNAS:** Yes, Judge.

8           **THE COURT:** All right. Anything further in this  
9   matter?

10          **MR. YANKELUNAS:** Not today, Your Honor.

11          **MR. JURATA:** Not here, Your Honor.

12          **MR. YANKELUNAS:** I guess we're we've got the sanctions  
13   motion pending before the Court and I guess the 18th is the  
14   deadline for any supplemental submissions, if there are going to  
15   be any.

16          That's kind of where we are right now.

17          **THE COURT:** If that's what the minute entry says, I  
18   don't have it in my head.

19          **MR. YANKELUNAS:** Yeah.

20          **THE COURT:** But I could look it up, but that's  
21   something --

22          **MR. YANKELUNAS:** It was -- it was 14 days from the day  
23   after the hearing, which was June -- which was January hearing  
24   was January 3, so we start counting on January 4.

25          **THE COURT:** Okay.

1                   **MR. YANKELUNAS:**   Okay.

2                   **THE COURT:**   That sounds good.

3                   **MR. YANKELUNAS:**   All right.   Thank you, Your Honor.

4                   **THE COURT:**   Thank you.

5                   **MR. JURATA:**   Thank you.

6                   **THE COURT:**   You're free to leave.

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8                               (Proceedings concluded at 2:49 p.m.)

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"I certify that the foregoing is a correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter."

s/ Bonnie S. Weber

Signature

February 4, 2022

Date

**BONNIE S. WEBER**

Official Court Reporter  
United States District Court  
Western District of New York